No. 88-6546

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ALBERT DURO,

Petitioner,

v.

EDWARD REINA, Chief of Police Salt River Department of Public Safety, Salt River Pima-Maricopa Indian Community; and the HON. RELMAN R. MANUEL, SR., Chief Judge of the Salt River Pima-Maricopa Indian Community Court,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

Table of Authorities Continued

ARGUMENT

I. THE SALT RIVER TRIBE DOES NOT HAVE CRIMINAL JURISDICTION OVER ALBERT DURO, A NONMEMBER INDIAN

Indian tribal courts possess inherent sovereignty to regulate internal affairs among their own members. "Implicit divestiture" of sovereignty occurred over "relations between an Indian tribe and nonmembers of the tribe . . .". *United States v. Wheeler*, 435 U.S. 313, 323-24 (1978). Albert Duro is a nonmember Indian. The Salt River Tribe cannot successfully assert criminal jurisdiction over him as part of its retained sovereignty.

The Salt River Tribe has never entered into a treaty with the United States. Its jurisdictional claim is not supported by a negotiated treaty or through Congressional delegation. Although the Salt River Tribe[1] has established a criminal code under the Indian Reorganization Act of 1934 (Title 25 U.S.C. Sec. 461 *et. seq.*), the Act did not give nor confirm criminal jurisdiction over nonmembers to the Salt River Tribe. The Act merely stabilized tribal powers vested "by existing law."

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[1] The Salt River Tribe consists of 55,807.40 acres near Scottsdale, Arizona. The Tribe owns 5,301.10 acres in fee and holds 31,372.71 acres as trust land. Individuals own 24,434.69 acres on the Salt River Reservation, presumably through allotment. Approximately 12,104.51 acres of individually owned land is leased to third parties for agricultural or business purposes. The Tribe leases an additional 1,767.89 acres to third parties for commercial purposes. See the Annual Report of Caseloads, Acreages Under B.I.A. and Surface Leasing dated Dec. 31, 1988, Branch of Real Property Management, Dept. of the Interior, Phoenix Area Office of the B.I.A.

The majority of persons living on Indian reservations in this country are non-Indians. Census data reveals that only 49.2 percent of the population living on reservations are American Indians. 64.2 percent of the population of the Salt River Reservation are American Indians. Only eight percent are nonmember Indians, while over 35 percent are non-Indians. The substantial population of non-Indians, as opposed to nonmember Indians, poses a far greater threat to law enforcement problems on Indian reservations than the small population of nonmember Indians. See American Indian Areas and Alaska Native Villages: 1980, Census Population, Supplementary Report, U.S. Dept. of Commerce, Bureau of Census. Cross deputization of officers has occurred between tribes, county and state law enforcement agencies in Arizona. Ariz Office of Econ. Planning and Develop., *Critical Issues in Indian-State Relations* at p. 37 (1981). Mutual aid provisions have also been enacted. See A R.S. Sections 11-952, 13-3872 thru 3874.

Oliphant v. *Suquamish Indian Tribe*, 435 U.S. 191, 195 n.5 (1978).

The Salt River Tribe's bare claim of territorial sovereignty, rather than personal sovereignty over its own members, begs for lawful authority. The Tribe acknowledges the effect of the Indian Civil Rights Act of 1968 and the Indian Reorganization Act of 1934, but boldly asserts that: "Beyond these Acts, the Congress has imposed no limitation upon the exercise of tribal court jurisdiction over Indians." Br. of Resp. at p. 9. The Salt River Tribe assumes that the power to try nonmembers is part of its retained sovereignty unless expressly extinguished. As this Court stated in *Oliphant*, however, "the tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments." *Oliphant* at 208.

Indian tribes retain the "power to prescribe and enforce internal criminal laws", which "involve only the relations among members of a tribe." *Wheeler* at 326. They are prohibited from exercising powers of autonomous states relating to external relations or nonmembers because they are "inconsistent with their status" as a diminished quasi-sovereign. *Oliphant* at 208. The pivotal conclusion in *Oliphant* is equally applicable to nonmembers as a whole.

> Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress.

Oliphant at 208. Congress has failed to delegate such authority to the Salt River Tribe.[2]

While the Salt River Tribe now requests that its members be subjected to criminal jurisdiction of other tribes, it is interesting to note that one of the principal interests of the Pima Indians in the federal government was to obtain protection against the Navajos and Apaches. W.T. Hagen, *American Indians* at p. 95. (Univ. of Chi. Press, 1961). The federal gov-

[2] The Salt River Tribe has unsuccessfully attempted to obtain congressional authorization to exercise criminal jurisdiction over nonmembers. See H.R. 4900, 99th Cong., 2d Sess., 132 Cong. Rec. H8111-12 (Sept. 23, 1986). It appears that the Tribe amended its law and order code in 1980 to include criminal jurisdiction over "any person."

ernment has historically provided protection to Indian tribes by exercising jurisdiction over intertribal disputes and preserving peace among Indian tribes. See the Br. of Pet. at pp. 23-29. The Brief for the United States has passed over one of the most fundamental and enduring roles played by the federal government in its relation with Indian tribes, which was resolving intertribal disputes.[3] The potential for animosity and prej-

[3] Also see, e.g., *Report from the Office of Indian Affairs*, S.D. No. 1, 24th Cong., 2d Sess., at pp. 380-407 (1936) (A key role of the federal government was to preserve peace on the frontier between the several tribes and to establish an amiable relationship between them.); *Protection of Western Frontier*, H.D. No. 59, 25th Cong., 2d Sess. (1838) (Military posts are necessary in Indian territory to maintain peace among the Indians and to protect "feebler tribes against the stronger and more warlike nations that surround them which the United States are bound to do by treaty stipulations."); Debates of Congress, Gale and Seatons Register, at pp. 4763-4779 (June 25, 1834). Congress understood the "customs of the tribe" relating to criminal jurisdiction" to be that of a "blood-avenger" that utilized crude revenge to settle disputes. Cong. Record-House, January 9, 1885, at p. 934.

The fragmented and revisionist view of history set forth in the Brief for the United States cannot be sustained upon closer examination. The government's brief focuses upon Section 25 of the Trade and Intercourse Act of 1834, which was drafted in conjunction with the Western Territory Bill. Although the latter bill failed, the Act of 1834 established that all parts of the United States east of the Mississippi river shall be "deemed to be Indian Country." (Sec. 1). Section 19 provided that the federal government would "procure the arrest and trial of all Indians accused of committing any crime, offence, or misdemeanor" within Indian Country. The military force of the United States could be employed "in the apprehension of such Indians, and also, in preventing or terminating hostilities between any of the Indian tribes." (Sec. 19).

The Trade and Intercourse Acts were designed to deter violent clashes between white frontierpersons and groups of Indians. But, the provisions of the Trade and Intercourse Acts were never effectively enforced. See F.P. Prucha, *American Indian Policy in the Formative Years—The Indian Trade and Intercourse Acts (1790-1834)*, at pp. 193-203 (Univ. of Neb. Press 1962). The exception to federal jurisdiction for offenses by "one Indian against another" was understood to preserve tribal sovereignty allowing tribes to punish their own members.

> Since it was generally admitted that offenses among the Indians within the tribe or nation were tribal matters that were to be handled by the tribe and were of no concern to the United States government, crimes committed by Indians against other Indians did not fall within the scope of the intercourse acts. The sovereignty of the Indian tribes, no matter how it might be circumscribed in other respects, was certainly considered to extend to the punishment of its own members.

F.P. Prucha at p. 211. Of course, the Trade and Intercourse Acts not only preserved, but could not and did not negate, contrary jurisdictional arrange-

udice between competing tribes and their members is probably greater than between Indians and non-Indians. See Br. of Pet. at pp. 48-50.

As set forth in Mr. Duro's opening brief, the principled reasoning of *Oliphant* and its progeny dictates the result in this case. *Wheeler* not only expressly stated that the holding in *Oliphant* applied to all nonmembers equally, it applied the rationale of *Oliphant* in a case where "the controlling question . . . [was] the source of [the tribe's] power to punish tribal offenders." *Wheeler* at 322.

It is important to note that *Oliphant* need not be re-examined, but only applied to a factual situation that is conceptually consistent with *Oliphant*. Indeed, the questioning by this Court of H. Barton Farr, III, who argued the case on behalf of

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ments contained in Indian treaties. R.N. Clinton, *Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective*, 17 Ariz. L. Rev. 951-991, at p. 959 (1975).

Indian treaties, not discussed within the Brief for the United States, repeatedly provided for federal jurisdiction over intertribal or "member-nonmember crimes." K.J. Erhart, *Jurisdiction Over Nonmember Indians on Reservations*, 1980 Ariz. State L.J., at pp. 737-741. The Brief for the United States, at pages 10-15, fails to refer to any objective analysis of the Trade and Intercourse Act besides its own. The government's view is not only held in isolation, but ignores dozens of Indian treaties that were ratified by Congress and expressly preserved by the Trade and Intercourse Acts.

The Brief for the United States is also inconsistent with earlier, administrative decisions of the United States. See, *infra.*, at pp. a-16. It essentially asserts that Indian tribes enjoy "territorial sovereignty", rather than "personal sovereignty", which is contrary to an objective review of history as well.

The ambiguous dicta contained in *United States* v. *Rogers*, 45 U..S. (How.) 567 (1846), is not nearly as persuasive or directed to resolve the issue presented by Mr. Duro, we submit, as the language and rationale of *United States* v. *Wheeler*, 435 U.S. 313 (1978), and other post-*Oliphant* cases. *Rogers* merely decided that a non-Indian citizen of the United States could not escape the laws of the United States by becoming an adopted "member" of the Cherokee nation. "Indians are regarded as belonging to their race." Mr. Rogers could become a "member" of the Tribe, but not an "Indian". He could not escape federal prosecution. But, since he was accused of murdering another "white man", the exception for "Indian upon Indian" crimes did not apply in any event. *Rogers* at 570-72. *Rogers* did not examine the extent or nature of tribal jurisdiction. But *Wheeler* explicitly examined the nature and scope of tribal jurisdiction. In fact, *Wheeler* did so with the benefit of well over one-hundred years of additional jurisprudence in the field of Indian law.

the United States, shows that *Oliphant* was decided and written on the narrowest possible factual grounds, but that it addressed the conceptual issue of jurisdiction presented by Mr. Duro's case as well.

> QUESTION: Well, it leaves it open, does it not? I mean, you concede that [an Indian tribe] is not a full sovereignty —as indeed you must.
>
> MR. FARR: We do concede that it is not a full sovereignty.
>
> QUESTIONS: And the question is, then does it include, as I say, the power to try and convict and punish **either non-members of the Tribe or non-Indians**?
>
> MR. FARR: That is right. I mean, **I think that that is a question which the Court has to decide in this case.** [emphasis added].

Transcript of oral argument in *Oliphant* v. *Suquamish Indian Tribe*, Case No. 76-5729, before the Supreme Court of the United States on January 9, 1978, at p. 66. Counsel for the United States also admitted that tribal governments never possessed or exercised "territorial sovereignty". Transcript at pp. 67-68.[4] As displayed later in this Reply Brief, Indian tribes possess personal, rather than territorial sovereignty over their own members.

The Respondent's and the government's reliance upon early cases decided during the formative years of our nation is misplaced. There was little reason to test the extent of criminal jurisdiction held by the Indian tribes, as noted in *Oliphant*, "because of the absence of formal tribal judicial systems." At p. 201. The early cases, therefore, do not specifically address this issue or articulate applicable rules of law with precise clarity. On balance, however, the language and reasoning of early cases

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[4] As emphasized by the Court during oral argument in *Oliphant*, the issue of law before the Court is whether or not tribal courts have criminal jurisdiction over nonmember Indians. The Court need not decide who has jurisdiction in the event that tribal governments do not have jurisdiction. Transcript at pp. 29-30. Also see the Br. for the U.S. in *Oliphant* at p. 10 (1977) ("Perhaps, at the end of the day, further legislation will be needed.").

support the proposition that criminal jurisdiction extends exclusively to tribal members.

> In the first case to reach this Court dealing with the status of Indian tribes, Mr. Justice Johnson in a separate concurrence summarized the nature of the limitations inherently flowing from the overriding sovereignty of the United States as follows: "The restrictions upon the right of soil in the Indians, amount . . . . to an exclusion of all competitors, [to the United States] from their markets; and the limitation upon their sovereignty amounts **to the right of governing every person within their limits except themselves.**" *Fletcher* v. *Peck*, 6 Cranch 87, 147 (1910) (Emphasis in *Oliphant*).

United States v. *Oliphant*, 435 U.S. 191, 209 (1978). Justice Marshall in *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831) characterized Indian tribes as "domestic dependent nations" that had acknowledged their dependency on the United States for protection—a relation of a "ward to his guardian." *Ibid*, at p. 17. Justice Baldwin stated that Indian tribes "were permitted to regulate their internal affairs in their own way . . . because Congress did not think proper to exercise" its exclusive right to do so. *Ibid.* at p. 40. Exclusive federal power over Indian tribes was established by J. Marshall in *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1932).

In *Ex Parte Crow Dog*, 109 U.S. 556 (1883), the Supreme Court found exclusive tribal jurisdiction over the offense of murder committed by one Sioux tribal member against another member on the Sioux tribe. Internal, "self-government" was defined as "the regulation by themselves of their own domestic affairs, **the maintenance of order and peace among their own members by the administration of their own laws and customs.**" *Ibid.* at p. 568. (emphasis added). Federal jurisdiction was lacking, in part, because members of the Sioux tribe were not citizens of the United States and were not "constituted members of the political community of the United States." At p. 569. Mr. Duro presents analogous arguments against jurisdiction by a foreign tribe in this case.

Also see *Talton* v. *Mayes*, 163 U.S. 376, 379-80 (1986) (The Cherokee Nation exists as an autonomous body subject to the

paramount authority of the United States. "And from this fact there has consequently been . . . [tribal] power to make laws defining offenses and providing for trial and punishment of . . . [violators] when the offenses are committed by one member of the tribe against another one of its members within the territory of the nation." (emphasis added). Also see *United States* v. *Kagama*, 118 U.S. 375 (1886); *In re Mayfield*, 141 U.S. 107, 115-116 (1891); and *Ex Parte Kenyon*, 14 F Cas. 353 (W.D. Ark. 1878). The building blocks of criminal jurisdiction over Indian lands are cited and discussed in *Oliphant* and its progeny.

Both the Brief of Respondent and the Brief for the United States conspicuously gloss over cases of fundamental importance, which were decided by this Court since *Oliphant*. For instance, the Respondent argues that the "notation in *United States* v. *Wheeler*, 435 U.S. 313, 326 (1978) that [Indian tribes] cannot try non-members in tribal courts . . . had no bearing at all on the decision of the Court." The Brief for the United States, at page 24, asserts that the "dicta" of *Wheeler* should not be "extended" to Mr. Duro's case as a matter of policy.

If Wheeler had not been a member of the Navajo Tribe, then the Tribe would not possess the inherent sovereignty to exercise criminal jurisdiction over him. On the other hand, delegated authority to prosecute a nonmember Indian by the Navajo Tribe would necessarily preclude prosection by the federal government because of the double jeopardy clause of the Fifth Amendment.

The conceptual reasoning and principles annunciated by *Montana* v. *United States*, 450 U.S. 544 (1980), and *Washington* v. *Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1979) are compelling when applied to this case. Both the Respondent and the United States dismiss them in short order because they are fatal to their position before this Court. At the same time, the Salt River Tribe, amici tribes, and the United States rely upon carefully spotted "language" from other cases, but to no avail. They all fail to advance a convincing argument of criminal jurisdiction over nonmembers. The same policy arguments advanced by the Indian tribes and the United

States were rejected in *Oliphant* as falling within the province of Congress.[5]

The tribe surprisingly relies upon *Rice* v. *Rehner*, 463 U.S. 713 (1983). See Br. of Resp. at p. 14. A closer look at the *Rice* case shows that it clearly follows *Oliphant* and favors the position of Mr. Duro. Eva Rehner, a federally licensed Indian trader, contended that she did not need a state license to sell alcohol on the Pala Reservation in San Diego, California.

> We begin by noting that there is nothing in the record to indicate that a federally licensed Indian trader like Rehner may sell liquor for off-premises consumption only to members of the Pala Tribe. Indeed, the State contends, and Rehner does not dispute, that Rehner, or any other federally licensed trader may sell liquor to Indian and non-Indian buyers alike. See Brief for Petitioner 81; Tr of Oral Arg 14. To the extent that Rehner seeks to sell to non-Indians, or to Indians who are not members of the tribes with jurisdiction over the reservations on which the sale occurred, the decisions of this Court have already foreclosed Rehner's arguments that the licensing requirements infringe upon tribal sovereignty. (footnote omitted).

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[5] The Respondent, amici tribes, and the government all argue that a jurisdictional void or vacuum will exist unless this Court legislates in favor of Indian tribes. The United States asserted that "tribal courts fill a hiatus" by prosecuting non-Indians in *Oliphant*. Br. for U. S. in *Oliphant* at p. 10. It also asserted that the question of whether or not state courts had jurisdiction over non-Indians should await until a later day. *Ibid* at 13.

It must also be noted that the government's position in this case was flatly rejected in *Oliphant* and in *Montana*. The concern of law enforcement as a matter of policy holds more significance when applied to non-Indians, who constitute the majority of residents on Indian reservations, than it does to nonmember Indians, who constitute a small minority of the population on Indian reservations. *Oliphant* squarely reserved policy questions concerning law enforcement to Congress. *Oliphant* at 212.

Other cases show that no lack of enthusiasm for the exercise of jurisdiction exists. The supposed jurisdictional vacuum will quickly be filled. See e.g., *United States* v. *John*, 437 U.S. 634 (1978); *Greywater* v. *Joshua*, 846 F.2d 486 (8th Cir. 1988); *State* v. *Flint*, 157 Ariz. 227, 756 P.2d 324 (Ct. App. 1988), *cert. denied*, No. 88-603 (June 26, 1989); *State v. Atteberry*, 110 Ariz. 354, 519 P.2d 53, 54-55 (1974). If criminal jurisdiction is transferred to tribal courts, a wide void will remain. Only one-half of all tribal governments have tribal courts. We will lodge pertinent materials from the official record in the *Greywater* case with the Clerk of this Court prior to oral argument.

Rice v. *Rehner*, 463 U.S. 713, 720 (1983). *Rice* follows and punctuates both the holding and rationale of *Colville*. The recent case of *Brendale* v. *Confederated Yakima Indian Nation*, 106 L.Ed 2d 343 (1989), also emphasizes the lack of tribal jurisdiction over "relations between an Indian tribe and nonmembers of the tribe." The consistency of this Court in defining "tribal sovereignty" or the "internal relations of a tribe" with respect to its own members clearly supports the position of Mr. Duro in this case.

II. THE CRIMINAL JURISDICTION OR PERSONAL SOVEREIGNTY OF TRIBAL GOVERNMENTS IS RECOGNIZED BY HISTORICAL REFERENCES

Tribal authorities generally did not utilize penal sanctions prior to contact with Anglo-American laws and culture. The exercise of "criminal jurisdiction", including the imposition of fines and imprisonment, by tribal governments is a contemporary phenomenon. F Cohen, *Handbook of Federal Indian Law* at p. 335 (1982 ed.). Nevertheless, tribal courts exercise criminal jurisdiction over their own members based upon a concept of personal, rather than territorial sovereignty. The Respondents, amici tribes, and the government have failed to review historical references carefully.

Indeed, tribal courts exist in only about one-half of all tribal governments today. Shocking abuses on the part of tribal courts that do impose criminal sanctions has been noted by congressional investigations relating to the enforcement of the Indian Civil Rights Act of 1968, Title 25 U.S.C. Sections 1301 *et. seq*. See the Congressional Record-Senate, August 11, 1988, at pp. S11652-56, and March 5, 1989, at pp. S2186-92.

The Salt River Tribe asserts that "a series of opinions of the Solicitor of the Department of the Interior" clearly resolve the issue of tribal court criminal jurisdiction over nonmember Indians in favor of Indian tribes. However, a careful review of pertinent decisions from the Department of the Interior will unequivocally show not only that the Respondent is wrong, but that the government's historical analysis is faulty as well. See

Br. of Resp. at p. 21.[6] Indian tribes possess inherent, criminal jurisdiction only over their own members.

In an extensive decision entitled "Powers of Indian Tribes" dated October 25, 1934, the Solicitor of the Department of the Interior summarizes the powers of local self-government retained by Indian tribes. It was understood that Indian tribes maintain the power to regulate domestic relations of its members and to "administer justice with respect to all disputes and offenses of or among the **members of the tribe,** other than the ten major crimes reserved to the federal courts" [emphasis added]. In addition, Indian tribes could "exclude from the limits of the reservation non-members of the tribe, excepting authorized Government officials . . .". 55 I.D. 14, 1 Op. Sol. 445 (1934).

Subsequent decisions of the Department of the Interior explain and solidify the conclusion of the Solicitor reached in 1934. It is interesting to note that the Respondent relies upon and the government ignores the decision of the Acting Solicitor dated March 17, 1937, relating to an ordinance adopted by the Tribal Council of the Confederated Salish and Kootenai Tribes. See Br. of Resp. at pp. 21-22. The Acting Solicitor expressly stated that the Tribal Council has criminal jurisdiction only over members of the Confederated Tribes. He then suggested that further consideration be given to the possibility of enlarging jurisdiction by amending the tribal constitution "or possibly delegation of departmental authority." 1 Op. Sol. 736 (1937).

Several decisions authored by the ardent supporter of Indian sovereignty, Solicitor Nathan Margold, expressly recognized that Indian tribes possess criminal jurisdiction only over their

[6] *The Report of Federal, State, and Tribal Jurisdiction,* Final Report, American Indian Policy Review Commission, at pp. 149-51 (1977), concedes that the Department of the Interior "conceived of the power of Indian tribes as being limited to the membership of their own tribes." The Commission referred to the decisions of the Department discussed above, nameiy 1 Op. So. 445 (1934) and 1 Op. Sol. 531 (1935). The Respondent's assertion to the contrary is simply erroneous.

own members.[7] For instance, Solicitor Margold stated that the "[i]nherent rights of tribal self government may be invoked to justify punishment of members of the tribe **but not of non members.** Non members may be excluded or deported from the tribal jurisdiction, but they are not otherwise subject to punishment at the hands of tribal authorities." [cites omitted]. 1 Op. Sol. 699 (1936). Also see, 1 Op. Sol. 484 (1934). Subsequently, the same conclusion was reached by Acting Solicitor, Frederick L. Kirgis. He expressly concluded that a Canadian Indian could only be subjected to "the local Indian court and the tribal ordinances as long as he is a member." On the other hand, "Mr. Deegan cannot be removed from the reservation as long as he remains a member of the tribe." 1 Op. Sol. 856 (1938).

It is curious to find that the Salt River Tribe relies upon the decisions of the Department of the Interior relating to criminal jurisdiction over nonmember Indians on the Rocky Boy's Reservation. See Br. of Resp. at p. 22. Unfortunately, the Respondent's brief fails to mention all of the decisions of the Department of the Interior which review the problem of criminal jurisdiction on the Rocky Boy's Reservation.

[7] Professor Nathan Margold was appointed Solicitor in 1933 by Harold L. Ickes, Secretary of the Interior. In turn, Professor Margold hired Felix Cohen to help dr[illegible] legislation which would transfer to Indian tribes and individual Indians greater authority over their own economic and political affairs. The Act, originally called the Wheeler-Howard Act, later became known as the Indian Reorganization Act of 1934, Title 25 U.S.C. Sec. 461 *et. seq.* Felix Cohen later became Associate Solicitor and Chairman of the Interior's Board of Appeals. See the bibliography of Felix S. Cohen, which is reprinted in F. Cohen, *Handbook of Federal Indian Law* (1942 ed.).

But, even the Indian Reorganization Act, as originally drafted, provided for tribal or community courts that would exercise criminal jurisdiction only over "members of the chartered community", and only if prosecution had not been instituted "in any other court of competent jurisdiction." A federal Court of Indian Affairs was envisioned to handle all cases involving intertribal offenses. Hearing before the Committee on Indian Affairs, United States Senate, 73rd Cong., 2d Sess., on S. 2755 (To Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise) at pp. 3 and 12-13 (1934). The proposed legislation was similar to the provisions of the Western Territory Bill (1834). See Br. of Pet. at pp. 28-30, 37. The same understanding of and proposals for criminal jurisdiction by Indian tribes existed for one-hundred years.

Solicitor Margold offered two solutions to the Superintendent of the Rocky Boy's Agency relative to the enforcement of criminal laws over nonmember Indians on the reservation. First, Solicitor Margold suggested that the Secretary of the Department of the Interior could "delegate to the tribal court authority to deal with such Indians."[8] Second, the Solicitor suggested that the problem "might be alleviated if those nonmember Indians who have apparently lived on the reservation for some time, making their homes on tribal land, and who are related to members of the tribe, were to be adopted into full tribal membership." 1 Op. Sol. 849 (1938). Less then two months later, Solicitor Margold suggested that "a gap of law

[8] Commissioner Price first originated the Court of Indian Affairs in order to combat "heathenish" customs during 1883. Congress never expressly authorized the origination or operation of the Court of Indian Offenses. However, Congress subsequently appropriated funds to maintain and operate not only the Court of Indian Offenses, but also Indian police employed by the Department of the Interior. The Continued acquiescence by Congress over the exercise of the power to maintain peace and order upon Indian reservations by the Department of the Interior implicitly authorized their existence. 1 Op. Sol. 531, 535 (1935). In *United States* v. *Clapox*. 35 Fed. 573, 577 (D.C. Ore 1888), the Court of Indian Offenses was described as "mere educational and disciplinary instrumentalities by which the government of the United States is endeavoring to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian." The Secretary of Interior derived its authority to make rules and regulations dealing with Indian affairs from several acts of Congress giving that office general regulatory power over Indian affairs. 1 Op. Sol. 531 (1935).

The Department of Interior specifically recognized that Courts of Indian Offenses do not rely solely upon the authority of the Secretary of Interior to establish legal validity. Indian tribes have the inherent power to govern their own members. 1 Op. Sol. 531, 536 (1935). The Secretary of the Interior authorized the Court of Indian Offenses to exercise jurisdiction over nonmember Indians. Also see, 1 Op. Sol. 985 (1940); 1 Op. So. 891 (1939); 2 Op. Sol. 2078 (1938); 1 Op. Sol. 844 (1938).

The Respondents also rely upon an opinion of Solicitor Margold relating to efforts by the Navajo tribe to prohibit the introduction of peyote on its reservation. 1 Op. Sol. 1009 (1940). The Solicitor apparently suggested that the proposed ordinance could apply to nonmembers as well. See Br. of Resp. at p. 22. But, of course, all nonmembers can be excluded from the reservation by the tribe. Moreover, the Navajo tribe was operating under a "CFR Court" or Court of Indian Offenses under the B.I.A. in 1940. It first established a tribal court in 1958. Navajo Tribal Council Resolution CO-69-58. The CFR Court, as an arm of the federal government, could assert jurisdiction over nonmembers in 1940.

enforcement" may exist when an attempt is made to subject a nonmember to criminal jurisdiction under a "tribal" law and order code, rather than the authority and regulations of the Department of the Interior. 1 Op. Sol. 859 (1938).

The same problem was revisited by the Department of the Interior a few months later. Acting Solicitor, Frederick L. Kirgis, again suggested that the Rocky Boy's Tribe could exclude nonmember Indians from the reservation, but could not prosecute them for criminal offenses. Again, he suggested that the Department of the Interior, which "has broad jurisdiction over recognized Indians on Indian reservations", could delegate criminal jurisdiction to the Rocky Boy's Tribe. 1 Op. Sol. 872, 873 (1939).

In an extensive decision examining tripartite jurisdiction over Indian reservations, the Acting Solicitor, Frederick L. Kirgis, unequivocally concluded that "the unextinguished fragments of tribal sovereignty" relating to criminal jurisdiction "is primarily a personal rather than a territorial sovereignty." 1 Op. Sol. 891, 894-96, (1939).[9] As a result, tribal governments

[9] The concept of personal, rather than territorial sovereignty was consistent with the power of an Indian tribe to exercise jurisdiction over members off of the reservation. 1 Op. Sol. 891, 894-96 (1939). On the other hand, it has also been recognized that a "citizen" of the United States could not historically be subjected to the jurisdiction of tribal courts regardless of his or her actions on or "contacts" with the reservation. See, e.g., 1 Op. Atty. Gen. 939 (1834); 2 Op. Atty. Gen. 1640 (1843); 7 Op. Atty. Gen. 174, 184 (1855).

The Respondent's and the government's reliance upon the opinion of the Attorney General relating to the offense of murder "of one tribal Indian by another, their tribes being different, and the murder having been committed within the reservation of a third tribe . . ." is misplaced. The Br. of Resp., at page 21, and the Brief for the United States, at page 13, fail to mention that the murder occurred on the land of a tribal government without any law to cover the case. 17 Op. Atty. Gen. 566, 567 (1882). As a result, the Attorney General concluded that the tribe of the offender may assert criminal jurisdiction. Again, the concept of "personal", rather than territorial, jurisdiction was reinforced.

This Court has consistently recognized that Indian tribes maintain the right of occupancy over reservations without title to the land they possessed. *Winton* v. *Amos*, 255 U.S. 373, 391-92 (1921); *United States* v. *Kagama*, 118 U.S. 375, 380-82 (1886); *United States* v. *Rogers*, 45 U.S. (How.) 567, 572 (1846); and *Johnson* v. *McIntosh*, 21 U.S. 542, 573-74 (1823). Also see, 3 Kent's Commentaries (14th Ed.), at pp. 379-87, 399-400.

exercise jurisdiction over their own "members except as may be limited by Federal statutes." 1 Op. Sol. 891, 897 (1939). In turn, federal courts, established under Article III of the United States Constitution, exercise "an absolute and exclusive jurisdiction over any recognized Indian anywhere within Indian country." *Ibid.* Finally, the Department of the Interior exercises administrative guardianship powers over "all the Indians within the reservation, regardless of their residence or temporary location . . .". 1 Op. Sol. 891, 893 (1939). See *United States* v. *Clapox*, 35 Fed. 575 (D.C. Ore. 1883).

In a later decision analyzing and entitled the "Relation of Pueblos to their Members, the Federal Government, the State, and Others", Solicitor Margold reaffirmed the conclusion that Indian Tribes are allowed to administer justice only with respect to their own members. At the same time, Indian tribes are allowed to remove or exclude nonmembers of the tribe from the limits of the reservation. 1 Op. Sol. 913, 916, and 928 (1930). Also see, 1 Op. Sol. 985 (1940).

The Respondent relies upon Felix Cohen's *Handbook of Federal Indian Law* to support its assertion of criminal jurisdiction over nonmember Indians. However, Cohen recognized that Indian tribes generally have criminal jurisdiction over their own members and civil jurisdiction over their own territory. "An Indian tribe may exercise a complete jurisdiction over its members and within the limits of the reservation . . .". F. Cohen, *Handbook of Federal Indian Law*, at p. 148 (1942 ed.). The respondent has misconstrued a fundamental concept clearly annunciated by Felix Cohen. Indian tribes could only exercise criminal jurisdiction over their own members. Tribal courts exercised criminal jurisdiction over nonmember Indians only under express delegation by the Department of the Interior.

> Some tribes have exercised a similar jurisdiction, under express departmental authorization, over Indians of other tribes found on the reservation.

Ibid. Felix Cohen generally recognized that the laws of Indian tribes "owe their force to the will of members of the tribe." *Ibid.* at p. 122. In his chapter entitled "Criminal Jurisdiction",

Mr. Cohen quotes extensively and approvingly from the decision of Frederick L. Kirgis, Acting Solicitor, dated April 27, 1939. 1 Op. Sol. 891 (1939). See F. Cohen, at pp. 359-362 (1942 ed). Mr. Cohen reiterates the position of the Department of the Interior that Indian tribes do not posses "a strictly territorial sovereignty, but primarily a personal sovereignty." *Ibid.* at p. 361.[10]

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[10] The "Indian on Indian" exception to federal jurisdiction found in Title 18 U.S.C. Section 1152 can be understood by the historical landmarks discussed above. The Court of Indian Offenses operated by the Department of Interior exercised broad criminal jurisdiction over all Indians wherever they might be found. In turn, the Department delegated, at times, jurisdiction to Indian tribes. As a result, it was unnecessary for federal courts to exercise further jurisdiction over Indian crimes. In addition, the federal government contemplated and ratified treaties providing for the establishment of Indian Country west of the Mississippi, where Indian tribes would collectively exercise jurisdiction over individual Indians.

> In accordance with this state of things, the 25th section of the act of the 30th of June, 1834, declares that so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country; with a proviso, that the same shall not extend to crimes committed by one Indian against the person and property of another: thus evidently proceeding on the supposition that, under the treaties in relation to the Indian country west of the Mississippi, the Indian laws would only be applicable to Indians themselves.

1 Op. Atty. Gen. 693, 695 (1834). The Respondent has failed to provide any evidence that Congress intended to delegate criminal jurisdiction over intertribal offenses to individual Indian tribes.

Of course, the federal government exercised criminal jurisdiction over intertribal disputes ever since the treaty period. See the Br. of Pet. at pp. 21-26. Also see, the proposed Act of 1830 authorizing the President to exchange land with Indians and provide for their removal west of the Mississippi River. (May 28, 1830); Letter from William Clark, Superintendent Indian Affairs, to Secretary of War dated March 1, 1826, Doc. No. 231, at p. 654 (American State Papers).

Strong historical precedent also exists for the exercise of state jurisdiction over Indians not subject to the jurisdiction of tribal courts. Specifically, Solicitor Margold found "no objection" to the continued exercise of state jurisdiction "in accordance with the practice of some years' standing" to punish Indians not subject to the jurisdiction of a Court of Indian Offenses. 1 Op. Sol. 591 (1935). Also see, 17 Op. Atty. Gen. 460 (1882). State and territorial courts were given jurisdiction over Indians that had received allotment of land under the General Allotment Act of 1887. 2 Op. Sol. 1457 (1947); 1 Op. Sol. 1974 (1941); F. Cohen, *Handbook of Federal Indian Law*, at pp. 359-61 (1942 ed.). Since over eighty percent of Indian land was lost through allotment, state courts exercised significant jurisdiction over Indian allotment lands from 1887 to 1948, when "Indian Country" was redefined to include Indian allotments. See the Br. for the U.S. at n.14.

The personal, retained sovereignty of the Salt River Tribe does not authorize criminal jurisdiction over Albert Duro, a nonmember Indian.[11]

Respectfully submitted,

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Counsel for Petitioner

[11] Mr. Duro maintains that tribal prosecution of nonmember Indians, in light of *Oliphant*, violates the equal protection provisions of both the Indian Civil Rights Act of 1968 and the United State Constitution. (Joint App. at p. 10).

APPENDIX

APPENDIX

101st Congress

1st Session

S.517

To provide Federal court authority to enforce rights secured by the Indian Civil Rights Act of 1968, and for other purposes.

IN THE SENATE OF THE UNITED STATES

March 6 (legislative day, January 3), 1989

Mr. Hatch introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To provide Federal court authority to enforce rights secured by the Indian Civil Rights Act of 1968, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That this Act may be cited as the "Indian Civil Rights Act Amendments of 1989".

Sec. 2. Title II of the Civil Rights Act of 1968 (Public Law 90-284, 25 U.S.C. 1301 et. seq.), commonly called the Indian Civil Rights Act or the Indian Bill of Rights, is amended by adding to the end thereof the following new section:

"CIVIL ACTIONS"

Sec. 204. (a) Compliance With Section 202.— Federal district courts shall have jurisdiction of civil rights actions alleging a failure to comply with rights secured by this Act. Sovereign immunity shall not constitute a defense to such an action.

"(b) Any aggrieved individual, following the exhaustion of such tribal remedies as may be both timely and reason-

able under the circumstances, or the Attorney General on behalf of the United States, may initiate an action in Federal district court for declaratory, injunctive, or other equitable relief against an Indian tribe, tribal organization, or official thereof, alleging a failure to comply with rights secured by this Act.

"(c) In any civil action brought by an aggrieved individual, or by the Attorney General, the Federal district court shall adopt the findings of fact of the tribal court, if such findings have been made, unless the district court determines that—

"(1) the tribal court was not fully independent from the tribal legislative or executive authority;

"(2) the tribal court was not authorized to or did not finally determine matters of law and fact;

"(3) the tribal court permitted those subject to the Act, on issues of declaratory, injunctive, or other equitable relief, to interpose a defense of immunity;

"(4) the tribal court failed to resolve the merits of the factual dispute;

"(5) the tribal court employed a factfinding procedure not adequate to afford a full and fair hearing;

"(6) the tribal court did not adequately develop material facts;

"(7) the tribal court failed to provide a full, fair and adequate hearing; or

"(8) the factual determinations of the tribal court are not fairly supported by the record,

in which event the district court shall conduct a de novo review of the allegations contained in the complaint.

"(d) In any civil action brought under this Act the Federal court shall, whenever a question of tribal law is at issue, accord due deference to the interpretation of the tribal court of tribal laws and customs."

22 Aug 1988

Honorable Orrin Hatch
135 Russell Senate Office Building
Washington, D.C. 20510

Subject: S. 2747; "Indian Civil Rights Act Amendments of 1988"

Dear Senator Hatch:

I am writing in support of S. 2747, a bill to amend the Indian Civil Rights Act of 1968, 82 Stat. 77-78 (Public Law 90-284) (Title II of the Civil Rights Act of 1968). The amendment strengthens enforcement of the ICRA by providing federal courts with carefully structured jurisdiction to enforce individual rights under the Act.

The amendment is necessary, in our view, because existing ICRA compliance procedures fail to fully protect rights secured by the ICRA. In some cases, for example, tribal courts do not exist. In other circumstances, tribal courts may lack authority to review actions of tribal governments. In addition, sovereign immunity and other jurisdictional barriers may limit the ability of tribal courts to effectively enforce the ICRA. Finally, because many tribal courts are subordinate to other branches of tribal government, judicial independence suffers; the lack of a meaningful separation of tribal powers may result in an impermissible interference with the work of tribal courts.

1. **Introduction**

The Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. §§ 1301-3, fills the void left by the Constitution's failure to limit or restrict tribal authority. *See, Talton* v. *Mayes*, 163 U.S. 376 (1896). The Act provides "for the American Indian the broad constitutional rights afforded to other Americans," and thereby "protect individual Indians from [unwarranted] actions of tribal governments". *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 61 (1978) (quoting S. Rep. No. 841, 90th

Cong., 1st Sess., 5-6 (1967)). While the ICRA contains many of the protections found in the Constitution, except for habeas corpus, it is unenforceable in federal courts. Instead, tribal forums enjoy exclusive jurisdiction of civil actions brought to enforce the ICRA. *Santa Clara Pueblo*, *supra*. The enforcement of such basic guarantees as free speech, due process and equal protection are wholly dependent on the effectiveness of tribal institutions and procedures—often the same tribal institutions and procedures alleged to have violated the act. We understand that the purpose of the proposed amendment is to remedy tribal non-compliance with the ICRA by providing access to federal district courts. Federal district court jurisdiction, together with a right of action by aggrieved individuals or the Attorney General, will check current compliance problems and assure a meaningful ICRA enforcement program.

Although tribal measures to enforce the ICRA are available in theory, such remedies may be unavailable in practice. Nearly one- half of all tribal governments, for example, have no tribal court. Where tribal courts exist, they may lack the power to review legislative or executive action, suffer jurisdictional impediments or be subordinate to the tribal council. Since the Supreme Court's decision in *Santa Clara Pueblo*, *supra*, the available literature, including the Report of the Presidential Commission on Indian Reservation Economies, and a number of federal court decisions, question the effectiveness of ICRA enforcement in tribal court. Allegations of ICRA violations also surfaced recently in hearings held by the United States Commission on Civil Rights. In testimony taken in Washington, D.C., Rapid City, South Dakota, Flagstaff, Arizona, and Portland, Oregon, a number of Indians and non-Indians shared evidence of non-compliance with the ICRA.

In order to assure that rights secured by the ICRA are enforced fully, change in the existing compliance procedure—including expanded access to federal district courts—is critical. Federal district court ICRA enforcement jurisdiction, coupled with the requirement of exhausting available tribal remedies and the other limitations built into the amendment,

balance legitimate tribal interests with a meaningful and effective ICRA compliance program. Without the amendment proposed here, or one very similar, individual rights guaranteed by Congress will remain a largely unfulfilled promise; one which continues to protect individual rights in theory but not in practice.

2. Failure To Enforce The ICRA Fully Post Santa Clara Pueblo

For 10 years prior to *Santa Clara Pueblo, supra*, the ICRA was routinely enforced in both tribal and federal courts. In fact, there is a strong presumption that an effective ICRA enforcement program encourages capital investment, jobs and tribal economic development generally. *See, e.g., Report And Recommendations To The President Of The United States*, Presidential Commission On Indian Reservation Economies, November, 1984. At least three factors , however, contribute to current ICRA noncompliance at the tribal level: first, judicial review may be unavailable or limited; second, tribal sovereign immunity and other jurisdictional impediments may bar or limit ICRA relief; and, third, tribal governing bodies may interfere with tribal courts.

a. The Lack Of Meaningful Judicial Review

The tribal courts lack clear authority to review tribal government action. See, Ziontz, *After Martinez: Civil Rights Under Tribal Governments*, 12 U.C. Davis L. Rev. 1, at 10-12 (1980). In some tribes, judicial review may be limited or not exist at all. Tribal courts are available in only about one half of the nation's nearly 300 federally recognized Indian tribes. *See, e.g., Santa Clara Pueblo, supra*. In other tribes, judicial review may be limited. The Cheyenne River Sioux Tribe, for example, explicitly reserves final authority over tribal action to tribal councils and not tribal courts. A recent Cheyenne River resolution states in part:

> BE IT FINALLY RESOLVED, that the Council shall retain the power to review the decision of the Tribal Court of Appeals on issues of law under such conditions and procedures as are found by the Council to be appropriate.

Cheyenne River Sioux Tribal Resolution No. 213-85-CF. Still other tribal councils address judicial review on a case-by-case basis. See, for example, Oglala Sioux Tribal Resolution No. 87-76 which provides in part:

> WHEREAS, the Oglala Sioux Tribe has reviewed the actions of the Tribal Court and Tribal Court of Appeals in the *Moore* case and find that the said courts have exceeded their authority under Ordinance No. 86-09, now
>
> THEREFORE BE IT RESOLVED, that the Oglala Sioux Tribal Council hereby declares that all court orders in the case of *Margaret Moore* v. *Oglala Sioux Tribal Personnel Board, et al.* are hereby declared null and void.

Elsewhere the rule may not be as clear, but the same tribal body against which suit has been filed may be also called upon to determine its propriety. See, *Runs After* v. *United States*, 766 F.2d 347, 353 (8th Cir. 1985), citing Justice White's dissent in *Santa Clara Pueblo*.

b. Sovereign Immunity And Other Jurisdictional Barriers To ICRA Enforcement In Tribal Court

> MS. MILLER: Do you believe that sovereign immunity is a bar to Indian Civil Rights Act claims against the tribe [in tribal court]?
>
> MR. GARREAU: Yes, I do. [The question] has come to the tribal council with regard to [a] waiver of sovereign immunity. As I stated, I sat on the tribal council. I served as administrative officer. At no time during those years, I believe from 1979 to the present [1986], has the tribal council ever waived sovereign immunity for anyone, for any case or cause at all.

MS. MILLER: So what that means is you are saying that the Indian Civil Rights Act really is unenforceable as against the tribe?

MR. GARREAU: Unless the council waives sovereign immunity.

MS. MILLER: Which it hasn't done.

MR. GARREAU: No, they have not, for anyone.

Hearings, *supra*, at p. 377.

Cheyenne River is not an isolated case. Tribal court decisions which dismiss or limit ICRA actions by invoking sovereign immunity have occurred in a number of jurisdictions. For example, in *Satiacum* v. *Sterud*, No. 82-1157 (Puy. Tr. Ct., April 23, 1982), 10 Indian L. Rep. 6013, the Puyallup Tribal Court rejected the argument that *Santa Clara Pueblo* "represents an explicit waiver of the tribe's immunity" in an ICRA action in tribal court. *Id.* at 6015. *See, also, Whatoname* v. *Hualapai Tribe et al.*, Civil No. 003-80 (Hualapai Ct. of App., May 11, 1981) (The tribal court dismissed an ICRA case commenting that "[i]t is difficult for this Court to fathom how the Indian Civil Rights Act can be said to waive the immunity of the Tribe in its own Courts by implication while such waiver by implication was expressly rejected by the federal courts". Unreported slip op. at 8). In *DuBray* v. *Rosebud Housing Authority*, No. CIV83-01 (Rosebud Sioux Tr. Ct., Feb 1, 1985), 12 Indian L. Rep. 6015 (*app. pndg.*, South Dakota Intertribal Ct. of App.), the tribal court found "no provision in the tribal code which would waive the tribe's immunity suits based on claim under [the ICRA]". *Ibid.* Therefore, the tribal court continued, "because the tribe's immunity has not been waived, the plaintiffs' [ICRA] complaint must be dismissed." *Ibid.*

The Colville Tribal Court, relying in part on a tribal ordinance which held that "the Colville Confederated Tribes shall be immune from suit in any civil action, and their officers and employees immune from suit for any liability arising from the performance of their official duties," dismissed a reapportionment suit against the tribal Business Council brought pursuant to the ICRA. *Colville Confederated Tribes Business Council* v. *George*, No. CV84-402, (Colv. Tr. Ct., Nov. 8, 1984), 11 Indian L. Rep. 6049, 6050. *See, also, Garman* v. *Fort Belknap Community Council*, No. CV83-238, (Ft. Blkp Tr. Ct., Jan. 20, 1984), 11 Indian L. Rep. 6017 (ICRA case dismissed against tribal defendants with the observation that the tribe has "not chosen to expressly waive tribal sovereign immunity to allow enforcement of the Indian Civil Rights Act in tribal courts") and the cases cited by Johnson and Madden, *Sovereign Immunity In Indian Tribal Law*, 12 Am. Indian L. Rev. at 167, n. 59 (1984).

In cases where sovereign immunity presents no bar to ICRA enforcement, other jurisdictional considerations may intervene. For example, tribal court civil jurisdiction may be limited to cases in which both parities are members of the tribe or each consent to tribal court jurisdiction. *See, Dry Creek Lodge, Inc.* v. *Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), cert, denied, 449 U.S. 1118 (1981) ("[A]ccess was denied to tribal court". *Id.* at 685. (Holloway, J., dissenting)).

c. The Lack Of Judicial Independence Contributes To ICRA Non-Compliance

Although some tribal courts may be successful in establishing the principle of judicial review and, further, may even overcome serious jurisdictional barriers such as the doctrine of sovereign immunity, other obstacles may still impede the full enjoyment of rights secured by the ICRA. Tribal governing bodies, for example, may interfere with the process of tribal courts. While there may be the appearance of ICRA enforcement of the tribal level, the reality is often impaired by a lack of tribal separation of powers or judicial independence. The 1984 Report of the Presidential Commission on Indian Reservation Economies found that the

> failure [of tribal governments] to adhere to a constitutional principle separating executive, legislative and judi-

> cial powers has had a detrimental effect on [tribal] governmental functioning. For example, the failure to establish a clear separation of powers between the tribal council and the tribal judiciary has resulted in political interference with tribal courts, weakening their independence, and raising doubts about fairness and the rule of law.

Report And Recommendations To The President Of The United States, supra, Part One, 29.

Recent hearings before the United States Commission on Civil Rights provides further evidence that tribal courts may be preempted in their effort to enforce rights secured by the ICRA. Former Chief Judge Trudell Guerue of the Rosebud Sioux Tribal Court wrote that there is an "absence of any forum in which the Indian Civil Rights Act is enforceable." Guerue, *The Indian Civil Rights Act—How It Is Used As License And Not As Protection*, 1986, 3 (unpublished paper in the files of the United States Commission on Civil Rights). This is true, according to Guerue, because tribal councils control tribal courts; "removal from office or the bench is not an uncommon tribal council tool." *Id.* at 4. This lack of judicial independence or separation of tribal powers was echoed by a number of other Indian judges. For example, former tribal judge Walter Woods of the Cheyenne River Sioux Tribe testified before the Civil Rights Commission that tribal

> judges are politically appointed so they can be controlled by the council. If they make decisions that are not favorable with the council, then they will be removed without a hearing—because I know; I was one of the individuals that was removed.

Hearings before the United States Commission on Civil Rights, Rapid City, S.D., 1986, 392. Former Cheyenne River Sioux Tribal Chairman Garreau confirmed that "[a]ll it takes is just an action of the tribal council to remove a judge." *Id.* at 383.

A number of federal court decisions further underscore the lack of an independent tribal judiciary. In *Shortbull* v. *Looking Elk*, 677 F. 2d 645 (8th Cir.), cert. denied, 459 U.S. 907 (1982),

the Eighth Circuit noted that "because of [a tribal court] ruling, Judge Red Shirt was removed from office and was replaced by a judge more sympathetic to the tribal Executive Committee, who quashed Judge Red Shirt's orders." *Id.* at 650. Similarly, in *Runs After* v. *United States, supra*, the Eighth Circuit found that after the tribal court upheld a contested voting redistributing plan "the Tribal Council terminated the tribal court judge * * * and appointed a new tribal court judge." *Id.* at 348. In addition, the tribe "forever barred" the original *Runs After* judge from tribal political or elective office. Resolution No. 190-84-CR, Cheyenne River Sioux Tribe, July 12, 1984. *Id.* at 349.

3. The Need To Expand Federal District Court ICRA Jurisdiction

With the exception of habeas corpus authority, ICRA enforcement is now left exclusively to tribal forums. The Supreme Court's dicta that tribal forums are "available to vindicate rights created by the ICRA", *Santa Clara Pueblo, supra*, at 65, has, in some cases, not proved accurate. The failure to establish tribal courts, the lack of judicial review, the doctrine of sovereign immunity, jurisdictional barriers, and tribal council interference with tribal courts are some of the factors which impede full tribal enforcement of rights secured by the ICRA. Administrative solutions, including budget priority and more training for tribal judges, while important, solve only part of the problem; standing alone such remedies fail to address the systemic or institutional factors discussed above.

Several federal court decisions recognize the anomaly of creating statutory rights without an adequate enforcement mechanism or remedy. In *Garreaux* v. *Andrus*, 676 F. 2d 1206 (8th Cir. 1982), for example, the Eight Circuit acknowledged "that the plaintiffs are being treated unfairly by the tribal council" but, citing *Santa Clara Pueblo*, went on to hold that federal courts lack statutory authority to consider ICRA

claims. *Id.* at 1210, n. 2. *See also, Shortbull* v. *Looking Elk, supra;* and *R. J. Williams Co.* v. *Fort Belknap Housing Authority,* 509 F. Supp. 933, 939 (D.C. Mont. 1981), rev'd and remanded on other grounds, 719 F. 2d 979 (9th Cir. 1983), cert. denied, 472 U.S. 1016 (1985) ("This case illustrates the absurd results that the broad rule of *[Santa Clara Pueblo]* can cause.").

Courts, however, properly defer to congressional action. In *Wells* v. *Philbrick*, 486 F. Supp. 807 (D.S.D 1980), for example, the court said

> [i]t certainly may be argued that the effect, after *Santa Clara Pueblo*, of the ICRA is to create rights while withholding any meaningful remedies to enforce them, but it is for Congress, not the Courts, to resolve this state of affairs [citing *Santa Clara Pueblo*, 436 U.S. at 72].

Id. at 809 [citation omitted].

Evidence of non-compliance with rights secured by the ICRA is important because, as the Court noted in *Santa Clara Pueblo*,

> Congress' authority over Indian matters is extraordinarily broad * * * Congress retains authority expressly to authorize civil actions for injunctive or other relief to redress violations of [the ICRA], in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions.

Id. at 72. In fact, the Presidential Commission on Indian Reservation Economies has made such a recommendation. The Commission, in its November 1984 report, recommends

> that legislation be provided for appellate review of tribal court decisions to the federal court system where constitutional or statutory rights are involved.

Report And Recommendations To The President, supra, Part One at 30.

Support for federal court ICRA enforcement authority can be found in the literature as well. Professor Wilkinson, for

example, argues "that federal judicial review of tribal action is often appropriate and perhaps should be expanded". Wilkinson, *American Indians, Time, and the Law,* Yale Univ. Press, 1987, 113. A similar view was voiced by Gover and Laurence. In discussing the need to modify both *Santa Clara Pueblo, supra,* and *Oliphant* v. *Suquamish Indian Tribe,* 435 U.S. 191 (1978), they suggest that:

> [t]he legislative branch seems well-suited to judge the sophistication of Indian judicial systems * * * . [A legislative] modification of *Santa Clara* to grant a careful and not overly disruptive federal oversight of [tribal] jurisdiction might be acceptable. We leave the details of such legislation in the capable hands of Congress * * * . It would place a scalpel back in the federal judge's hand * * *

Gover and Laurence, *Avoiding Santa Clara Pueblo* v. *Martinez: The Litigation In Federal Court of Civil Actions Under the Indian Civil Rights Act,* (Symposium on Indian Law), 8 Hamline L. Rev. 497, 523 (1985).

A number of tribal judges also recognize the need for federal court ICRA jurisdiction. Judge Sambroak of the Rosebud Sioux Tribal Court provided the following testimony to the United States Commission on Civil Rights:

> MR. MCDONALD: Do you believe the ICRA should be amended to allow [a] private right of action in federal court?
>
> JUDGE SAMBROAK: Yes.

Hearings, before the United States Commission on Civil Rights *supra,* at 250. Chief Judge Lorraine Rousseau of the Sisseton Wahpeton Sioux Tribal Court echoed the same theme when she told the Civil Rights Commission:

> I guess what I'm saying is there may be a need for limited jurisdiction by the federal courts in certain cases.

Briefing Before the United States Commission on Civil Rights, Washington, D.C., February, 1986, at 196.

4. Conclusion

Santa Clara Pueblo, which held that federal courts lack jurisdiction after 10 years of ICRA enforcement, was premised on the assumption that "[t]ribal forums are available to vindicate rights created by the ICRA." *Id.* at 65. The record now shows serious tribal "deficien[cies] in applying and enforcing" the ICRA. Accordingly, we look to Congress, as did the Court in *Santa Clara Pueblo*, to permit "civil actions for injunctive or other relief to redress violations of [the ICRA]." *Id.* at 72. Systemic, institutional factors, including the lack of judicial review, jurisdictional impediments, sovereign immunity and the failure to provide for effective judicial independence, often contribute, as a practical matter, to the failure to enforce fully rights secured by the ICRA post *Santa Clara Pueblo*.

As tribal governments flourished under the policy of self-determination, the number of tribal courts autonomous from the federal government has also grown. In addition to providing for federal court ICRA enforcement authority, the legislation contains a number of incentives to strengthen and further develop tribal courts. Specifically, the amendment encourages tribal courts to resolve ICRA complaints by requiring individuals to exhaust tribal remedies before seeking a federal court solution, by limiting federal relief to equitable remedies, by requiring federal courts to adopt tribal findings of fact if certain circumstances are met, and by providing for deference to tribal court interpretation of tribal laws and customs.

We believe that the carefully construed approach to federal jurisdiction contained in this bill is consistent both with our goal to provide an effective and meaningful ICRA compliance process and with the principle that "federal courts must avoid undue or intrusive interference in reviewing tribal court procedures." *Smith* v. *Confederated Tribes of Warm Springs*, 783 F.2d 1409, 1412, (9th Cir. 1986), *cert. denied*, ____ U.S. ____, 107 S.Ct. 465, 93 L.Ed. 2d 410. As in federal habeas corpus cases under section 203 of the Act, it is anticipated that "where the tribal court procedures under scrutiny differ significantly

'from those commonly employed in Anglo-Saxon society,' *Howlett* v. *Salish and Kootenai Tribes*, 529 F.2d 233, 238 (9th Cir. 1976), courts [will] weigh 'the individual right to fair treatment' against 'the magnitude of the tribal interest (in employing those procedures)' to determine whether the procedures pass muster under the act." *Randall* v. *Yakima Nation Tribal Court*, 841 F.2d 897 (9th Cir. 1988), *quoting Stands Over Bull* v. *Bureau of Indian Affairs*, 442 F.Supp. 360, 375 (D.Mont. 1977), *appeal dismissed*, 578 F.2d 799 (9th Cir. 1978).

Federal district court ICRA jurisdiction, coupled with the limitations built into the amendment, *e.g.*, exhaustion of tribal remedies, relief limited to equitable remedies and tribal incentives to resolve ICRA complaints locally, balances legitimate tribal interests with a meaningful program to protect individual statutory rights. Access to federal courts reverts to the pre-*Santa Clara Pueblo* status quo and guarantees those the ICRA was enacted to protect an effective statutory enforcement forum.

We are informed by the Office of Management and Budget that the view expressed in this letter are in accord with the program of the President.

Sincerely,

/s/ Thomas M. Boyd

THOMAS M. BOYD
Acting Assistant Attorney General
Office of Legislative Affairs